RECORD AND BRIEFS

Nos. 13-354, 13-356

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Supreme Court of the United States

KATHLEEN SEBELIUS, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL., PETITIONERS

v.

HOBBY LOBBY STORES, INC., ET AL.

CONESTOGA WOOD SPECIALTIES CORPORATION, ET AL., PETITIONERS

v.

KATHLEEN SEBELIUS, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE THIRD AND TENTH CIRCUITS

BRIEF FOR FOREIGN AND COMPARATIVE LAW EXPERTS LAWRENCE O. GOSTIN, ET AL., AS AMICI CURIAE SUPPORTING PETITIONERS IN NO. 13-354 AND RESPONDENTS IN NO. 13-356

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CASES

Auto del Juzgado Contencioso-Administrativo No. 3 de Málaga, Pieza separada medidas provisionales No. 12.1/2011, Pmto. especial protección derechos fundamentales No. 39/2011, Apr. 5, 2011 (Spain) 25

Bob Jones University v. United States, 461 U.S. 574 (1983) 34

Braunfeld v. Brown, 366 U.S. 599 (1961) 29

Conseil constitutionnel [C.C.] [Constitutional Court] decision No. 2001-446DC, June 27, 2001, Rec. 74 (Fr.) 32

Corte Constitucional [C.C.] [Constitutional Court], mayo 10, 2006, Sentencia C-355/06 (Colom.) 31

Corte Constitucional [C.C.] [Constitutional Court], mayo 28, 2009, Sentencia T-388/09 (Colom.) 24, 31

Corte Constitucional [C.C.] [Constitutional Court], noviembre 27, 2009, Sentencia T-209/08 (Colom.) 19, 20, 24, 31

Corte Constitucional [C.C.] [Constitutional Court], agosto 10, 2012, Sentencia T-627/12 (Colom.) 31

Doogan & Wood v. NHS Greater Glasgow & Clyde Health Board, [2013] CSIH 36 (Scot.) 27

Gillette v. United States, 401 U.S. 437 (1971) 29

Jacobson v. Massachusetts, 197 U.S. 11 (1905) 7

TABLE OF AUTHORITIES – Continued

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Janaway v. Salford, HA [1988] 3 All ER 1079 (Eng.) 26, 27

Knight v. Florida, 528 U.S. 990 (1999) 6

Lawrence v. Texas, 539 U.S. 558 (2003) 7

Pichon and Sajous v. France, App. No. 49853/99 (Eur. Ct. H.R. 2001) 17

Planned Parenthood v. Casey, 505 U.S. 833 (1992) (plurality opinion) 8

Prince v. Massachusetts, 321 U.S. 158 (1944) 30

P. & S. v. Poland, App. No. 57375/08 (Eur. Ct. H.R. 2012) 19

R.R. v. Poland, App. No. 27617/04 (Eur. Ct. H.R. 2011) 18, 19

Reynolds v. United States, 98 U.S. 145 (1978) 29

Roper v. Simmons, 543 U.S. 551 (2005) 7

S.T.S., Nov. 27, 2009 (209/08) (Spain) 25

Sherbert v. Verner, 374 U.S. 398 (1963) 29

Texas Monthly, Inc. v. Bullock, 489 U.S. 1 (1989) (plurality opinion) 29

United States v. Lee, 455 U.S. 252 (1982) 29, 30

United States v. Then, 56 F.3d 464 (2d Cir. 1995) 6

West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) 29

TABLE OF AUTHORITIES – Continued

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STATUTES

Abortion Act, 1967 (U.K.) 23, 26

Contraception, Sterilisation, and Abortion Act 1977 (2013) (N.Z.).....33

Código Deontológico da Ordem dos Medicos (Port.).....23

Decreto No. 1282/2003, May 23, 2003 (Arg.).....33

Den Norske Legeforening [Code of Ethics for Doctors] (Nor.).....21

Gazzetta Ufficiale della Repubblica Italiana, Part I, 2 May 1978, No. 140 (It.) 23, 26

Health Act 1911 (WA) (Austl.).....33

Interrupção Voluntária Da Gravidez/Serviços Obtertricía, Portaria No. 189/98 de 21 março 1998 (Port.).....20

Legge 22 maggio 1978, n. 194, Gazzeta Ufficiale 22 maggio 1978, n. 140 (Norme per la Tutela Sociale Della Maternità e sull'Interruzione Volontaria Della Gravidanza) [Italian Rules for the Interruption of Pregnancy] (It.).....26

Ley No. 26.130, Aug. 9, 2006 (Arg.) 33

Ley Orgánica 2/2010, de 3 de marzo, de Salud Sexual y Reproductiva y de la Interrupción Voluntaria del Embarazo [Law of Sexual and Reproductive Health and Abortion] (2010) (Spain) 25

TABLE OF AUTHORITIES – Continued

Page

Ministerios de Salud [Health Ministry], Guía Técnica para la Atención Integral de los Abortos No Punibles, June 2010 (Arg.) 33

Sundhedsloven, LBK nr. 913 [Health Act, Law Notification no. 913], Copenhagen, Civilstyrelsen [Civil Affairs Agency] (Den.) 33

The Act dated 13 June, 1975 no. 50 concerning the Termination of Pregnancy, with Amendments in the Act dated 16 June 1978 no. 5 (Nor.) 25

OTHER AUTHORITIES

Albert Gore, U.S. Vice President, Statement at the International Conference on Population and Development (Sept. 5, 1994) 11

Buck Consultants, Total Remuneration, https://www.buckconsultants.com/Services/Compensation/Totalremuneration.aspx 28

Convention on the Elimination of All Forms of Discrimination Against Women art. 12 13

Christina Zampas & Ximena Andión-Ibañez, *Conscientious Objection to Sexual and Reproductive Health Services: International Human Rights Standards and European Law and Practice*, 19 Eur. J. Health L. 231 (2012) 10

TABLE OF AUTHORITIES – Continued

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Christina Zampas, *Legal and Ethical Standards for Protecting Women's Human Rights and the Practice of Conscientious Objection in Reproductive Healthcare Settings*, 123 Int'l J. Gynecology & Obstetrics S63 (2013) 10

Committee on the Elimination of Racial Discrimination, *Concluding Observations of the Committee on the Elimination of Racial Discrimination on the United States of America*, U.N. Doc. CERD/C/USA/CO/6 (2008).....14

Committee on the Elimination of Racial Discrimination, *Reports Submitted by States Parties Under Article 9 of the Convention: Seventh to Ninth Periodic Reports of States Parties Due in 2011: United States of America*, U.N. Doc. CERD/C/USA/7-9 (Oct. 2, 2013).....14

Conseil Constitutionnel, General Presentation, http://www.conseil-constitutionnel.fr/conseil-constitutionnel/english/presentation/presentation.25739.html 32

Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 .....6, 17, 18

David Canning & T. Paul Schultz, The Economic Consequences of Reproductive Health and Family Planning, The Lancet (July 10, 2012) 9

TABLE OF AUTHORITIES – Continued

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Fourth World Conference on Women, Beijing, China, Sept. 4-15, 1995, *Beijing Declaration and Platform for Action*, U.N. Doc. A/CONF. 177/20/Rev.1 (1996) 10

General Medical Council, Personal Beliefs and Medical Practice (Mar. 25, 2013) (U.K.) 21

Hilary R. Clinton, U.S. Secretary of State, Remarks on the 15th Anniversary of the International Conference on Population and Development (Jan. 8, 2010) 11

Human Rights Committee, *Concluding Observations by the Human Rights Committee: Peru*, U.N. Doc. CCPR/CO/70/PER (Nov. 15, 2000) 12

Human Rights Committee, *Concluding Observations of the Human Rights Committee: Albania*, U.N. Doc. CCPR/CO/82/ALB (Dec. 2, 2004) 12

Human Rights Committee, *Concluding Observations of the Human Rights Committee: Mali*, U.N. Doc. CCPR/CO/77/ML (Apr. 16, 2003) 12

Human Rights Committee, *Concluding Observations of the Human Rights Committee: Viet Nam*, U.N. Doc. CCPR/CO/75/VNM (July 26, 2002) 12

Human Rights Committee, *Concluding Observations on the Fifth Periodic Report of Peru*, U.N. Doc. CCPR/C/PER/CO/5 (2013) 12

TABLE OF AUTHORITIES – Continued

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Human Rights Committee, *Concluding Observations on the Fourth Periodic Report of the Philippines*, U.N. Doc. CCPR/C/PHL/CO/4 (Nov. 13, 2012) 12

Human Rights Committee, *Concluding Observations: Argentina*, U.N. Doc. CCPR/CO/70/ARG (2000) 13

Human Rights Committee, *Concluding Observations: Czech Republic*, U.N. Doc. CCPR/C/CZE/CO/2 (2007) 12

Human Rights Committee, *Concluding Observations: Hungary*, U.N. Doc. CCPR/CO/74/HUN (Apr. 19, 2002) 12

Human Rights Committee, *Concluding Observations: Poland*, U.N. Doc. CCPR/C/POL/CO/6 (Oct. 27, 2010) 13

Human Rights Committee, *Concluding Observations: Poland*, U.N. Doc. CCPR/CO/82/POL (2004) 13

Human Rights Committee, *Concluding Observations: Republic of Moldova*, U.N. Doc. CCPR/C/MDA/CO/2 (2009) 13

Human Rights Committee, *Concluding Observations: Slovakia*, U.N. Doc. CCPR/C/SVK/CO/3 (2011) 12

Human Rights Committee, *Concluding Observations: Slovakia*, U.N. Doc. CCPR/CO/78/SVK (2003) 12

TABLE OF AUTHORITIES – Continued

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Human Rights Committee, *General Comment No. 28: Article 3 (The Equality of Rights Between Men and Women)*, U.N. Doc. CCPR/C/21/Rev.1/Add.10 (Mar. 29, 2000) 12

Human Rights Committee, *Reports Submitted by States Parties Under Article 40 of the Covenant: Fourth Periodic Report: United States of America*, U.N. Doc. CCPR/C/USA/4 (May 22, 2012) 14

Human Rights Council, *Working Group on the Universal Periodic Review: National Report Submitted in Accordance with Paragraph 15(a) of the Annex to Human Rights Council Resolution 5/1*, U.N. Doc. A/HRC/WG.6/9/USA/1 (Aug. 23, 2010) 15

Inter-American Commission on Human Rights, Access to Information on Reproductive Health from a Human Rights Perspective (2011) 20

International Conference on Population and Development, Cairo, Egypt, Sept. 5-13, 1994, *Programme of Action of the International Conference on Population and Development*, U.N. Doc. A/CONF.171/13/Rev.1 (1995) 10, 11

International Federation of Gynecology and Obstetrics, Resolution on "Conscientious Objection" (2006) 22

TABLE OF AUTHORITIES – Continued

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John Kerry, U.S. Secretary of State, Video Remarks on Third International Conference on Family Planning, Washington, D.C. (Nov. 12, 2013) 15

Justin Falk, Congressional Budget Office, Comparing Benefits and Total Compensation in the Federal Government and the Private Sector (2012) 28

Mark R. Wicclair, Conscientious Objection in Health Care: An Ethical Analysis (2011) 17

Rebecca J. Cook & Bernard M. Dickens, World Health Organization, Considerations for Formulating Reproductive Health Laws 33 (2d ed. 2000) 24

Report of the Committee on the Elimination of Discrimination Against Women, 20th & 21st Sess., Jan. 19-Feb. 5, June 7-25, 1999, U.N. Doc. A/54/38/Rev.1 (1999) 13

Thomas M. Franck, *Is Personal Freedom a Western Value?*, 91 Am. J. Int'l L. 593, 598-599 (1997) 6

U.N. Development Programme, Human Development Report 2013: The Rise of the South: Human Progress in a Diverse World (2013) 9

Vicki C. Jackson, Constitutional Engagement in a Transnational Era (2010) 7

WMA Members' List, http://www.wma.net/en/60about/10members/21memberlist/index.html 22

TABLE OF AUTHORITIES – Continued

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World Health Organization, Family Planning: A Health and Development Issue, a Key Intervention for the Survival of Women and Children (2012) 8

World Health Organization, Safe Abortion: Technical and Policy Guidance for Health Systems (2012) 23

World Medical Association, About the WMA, http://www.wma.net/en/30publications/10policies/14/ 22

World Medical Association, Declaration of Geneva (adopted 1948, revised 2006) 22

World Medical Association, Declaration on the Rights of the Patient (1981) 22

BRIEF FOR FOREIGN AND COMPARATIVE LAW EXPERTS LAWRENCE O. GOSTIN, ET AL. AS AMICI CURIAE SUPPORTING PETITIONERS IN NO. 13-354 AND RESPONDENTS IN NO. 13-356

Professors Lawrence O. Gostin, Bernard Dickens, Erika R. George, Johanna E. Bond, and Jaya Ramji-Nogales respectfully submit this brief as amici curiae in support of petitioners in No. 13-354 and respondents in No. 13-356.[1]

INTEREST OF AMICI CURIAE

Amici curiae are leading experts in international and comparative law and global health law. Each has published and lectured widely in the field. Each has extensive knowledge of global judicial and legislative developments regarding women's access to reproductive health care.[2]

Lawrence O. Gostin is University Professor at Georgetown University Law Center, where he is also the Founding O'Neill Chair in Global Health Law and

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[1] A letter from Hobby Lobby Stores, Inc. consenting to the filing of this brief is being filed with the Clerk of the Court, pursuant to Rule 37.3(a). Letters from the other parties granting blanket consent to the filing of amicus curiae briefs have been filed with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of the brief. No person other than amici curiae, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

[2] Institutional affiliations are listed solely for identification.

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INTRODUCTION AND SUMMARY OF ARGUMENT

These cases present the questions whether and to what extent for-profit corporations that claim a religious objection to providing health insurance plans that cover contraception can refuse to comply with a public health law as a so-called conscientious objector. Other nations have weighed the rights of conscientious objectors against the rights of patients who seek access to health care, including reproductive health services. Their approach is instructive. Although it is still a relatively new issue, most countries recognize some degree of protection for conscientious objectors who have religious objections to particular health care services. To amici's knowledge, however, none would recognize the claims asserted here.

Insofar as other constitutional democracies have addressed these issues, they have not recognized a non-religious organization's request for exemption from a law requiring it to provide health insurance that includes coverage for the full range of legal contraception. Foreign courts, international human-rights bodies, and medical organizations all recognize that access to affordable contraception is a fundamental component of a woman's liberty, dignity, and equality.

Many foreign states provide robust protections for conscientious objectors for whom providing a medical procedure would involve breaching a deeply held religious view. But those states couple the

recognition of conscientious objection rights with the guarantee that women have access to the health care services to which they are entitled. Accordingly, the exercise of conscientious objection is regulated in order to give effect to both rights. As such, while a conscientious objector can refuse to provide a specific medical service, court decisions, laws, regulations, and medical codes of ethics require the objector to ensure that the patient is able to receive the service from a non-objector.

Moreover, when anyone other than a person who directly participates in the medical procedure asserts a right of conscientious objection, that assertion has been rejected. Amici are unaware of any decision by a foreign court or human-rights tribunal extending the right of conscientious objection to a for-profit corporation, much less where the issue in question is providing insurance coverage for basic health care services such as contraception. This Court should not make the United States an exception in a matter so paramount to women's health and liberty.

ARGUMENT

GLOBAL LEGAL DEVELOPMENTS CONFIRM THAT CONTRACEPTIVE ACCESS IS AN ESSENTIAL COMPONENT OF WOMEN'S HUMAN RIGHTS AND MAY NOT BE CIRCUMSCRIBED BY THE ASSERTION OF RELIGIOUS CONVICTIONS BY FOR-PROFIT CORPORATIONS

The right being asserted in these cases—a for-profit corporation's claim of a religious exemption from a public health law requiring insurance coverage for safe, lawful, affordable contraceptives—has not been recognized by foreign courts or other international tribunals. To the extent such courts and tribunals have addressed similar issues, they have rejected assertions of conscientious objector status by anyone other than individuals who directly participate in providing a medical service.

A. Foreign And International Law Serves As A Useful Touchstone For The Resolution Of These Cases

These cases require the Court to balance the conscience rights of objectors against the rights of the citizenry as a whole to access health care within a regulated system, a question that several foreign and international tribunals have confronted directly.

Respect for religious liberty, the separation of church and state, and equal protection of the law are all values the United States shares with other constitutional democracies.[3] Just as we have influenced the jurisprudence of other states, so too do we benefit from understanding how foreign nations that share many of our legal attributes, traditions, and history have confronted similar questions. "[T]he way in which foreign courts have applied standards roughly comparable to our own constitutional standards in roughly comparable circumstances" offers concrete evidence of solutions to common problems. *Knight v. Florida*, 528 U.S. 990, 997 (1999) (Breyer, J., dissenting); *see also United States v. Then*, 56 F.3d 464, 469 (2d Cir. 1995) (Calabresi, J., concurring) ("These countries are our 'constitutional offspring' and how they have dealt with problems analogous to ours can

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[3] *See* Thomas M. Franck, *Is Personal Freedom a Western Value?*, 91 Am. J. Int'l L. 593, 598-599 (1997) (tracing the traditional American constitutional safeguards for disestablishment and freedom of religion from the American founders to the French Revolution, the creation of an independent India, and Nelson Mandela's political leanings as reflected in the Constitution of the Republic of South Africa); *see also* Convention for the Protection of Human Rights and Fundamental Freedoms art. 9, Nov. 4, 1950, 213 U.N.T.S. 221 ("Everyone has the right to freedom of thought, conscience and religion * * * . Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.").

be very useful to us when we face difficult constitutional issues. Wise parents do not hesitate to learn from their children.").

In particular, this Court can benefit from examining the way in which foreign courts have construed the principles of "liberty," "dignity," and "equality" in similar cases. *See Lawrence v. Texas*, 539 U.S. 558, 572-573, 576-577 (2003). As this Court has explained, "[t]he opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions." *Roper v. Simmons*, 543 U.S. 551, 578 (2005).

Indeed, this Court has a long history of looking to the practices of other democratic states to resolve previously unexamined questions. For example, when state mandatory vaccination laws were challenged as unconstitutional in the early twentieth century, the Court looked to the practices in several European countries to satisfy itself that the restraints on liberty entailed by the law were reasonable in light of current understandings of scientific knowledge and the practices of other governments. *Jacobson v. Massachusetts*, 197 U.S. 11, 28 (1905); *see* Vicki C. Jackson, Constitutional Engagement in a Transnational Era 111 (2010).

The way foreign and international law has treated conscientious objections to the provision of reproductive services can aid this Court in striking the appropriate balance between ensuring access to basic

health care and protecting conscientious objection based on religious convictions.

B. The Opinion Of The World Community Supports Access To Health Care And Family Planning, Including Contraception

This Court has long recognized the link between women's access to family-planning services and their autonomy: "The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives." *Planned Parenthood v. Casey*, 505 U.S. 833, 856 (1992) (plurality opinion).

International human-rights and health institutions have also recognized this basic fact. For example, an analysis by the World Health Organization (the directing and coordinating authority for health within the United Nations) confirms that women's ability to control their fertility represents "a profound shift in the lives of women," and "an opportunity for enhanced participation in public life." World Health Organization, Family Planning: A

Health and Development Issue, a Key Intervention for the Survival of Women and Children 1-2 (2012).[4]

International instruments on population and development, which set priorities for global sustainable development, emphasize the equality and empowerment of women. For example, the 1994 International Conference on Population and Development (ICPD) Programme of Action (the Cairo consensus), adopted by the United States and 178 other countries, explicitly affirmed that reproductive rights are human rights. The ICPD found that reproductive rights are grounded in fundamental freedoms that are already recognized in national laws and international human rights instruments, such as rights to life, non-discrimination, privacy, and the

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[4] *Available at* http://apps.who.int/iris/bitstream/10665/75165/1/WHO_RHR_HRP_12.23_eng.pdf. *See also* U.N. Development Programme, Human Development Report 2013: The Rise of the South: Human Progress in a Diverse World 128 n.90 (2013) (concluding, based on a study of 97 countries, that "higher fertility is associated with lower labour force participation of women during their fertile years" and that "on average, each additional child reduces female labour force participation 5-10 percentage points for women 20-44"); David Canning & T. Paul Schultz, The Economic Consequences of Reproductive Health and Family Planning 6, The Lancet (July 10, 2012), *available at* http://www.mamaye.org/sites/default/files/evidence/The%20economic%20consequences%20of%20reproductive%20health%20and%20family%20planning.pdf (concluding that evidence from Asia and Africa suggests that fertility declines from access to family planning "change the social and economic position of women, reducing gender inequality and allowing women more opportunity to enter formal employment").

right to be free from inhumane and degrading treatment.[5] The ICPD concluded that guaranteeing women's reproductive health rights is critical for achieving gender equality and ensuring women's full participation in all aspects of society, and it called on states to effectuate these commitments by investing in family planning. To emphasize the point, the ICPD urged states to "make available a full range of effective [contraceptive] methods."[6] The United States not only affirmed the Cairo consensus, but was also a

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[5] International Conference on Population and Development, Cairo, Egypt, Sept. 5-13, 1994, *Programme of Action of the International Conference on Population and Development*, ¶ 7.3, U.N. Doc. A/CONF.171/13/Rev.1 (1995). Subsequent international consensus documents are in accord. For example, the Beijing Platform for Action, which elaborated on the commitments made in the ICPD Programme of Action, specifically acknowledged the role that sexual and reproductive health plays in women's equality. Fourth World Conference on Women, Beijing, China, Sept. 4-15, 1995, *Beijing Declaration and Platform for Action*, ¶ 92, U.N. Doc. A/CONF.177/20/Rev.1 (1996); *see also* Christina Zampas, *Legal and Ethical Standards for Protecting Women's Human Rights and the Practice of Conscientious Objection in Reproductive Healthcare Settings*, 123 Int'l J. Gynecology & Obstetrics S63, S64 (2013); Christina Zampas & Ximena Andión-Ibañez, *Conscientious Objection to Sexual and Reproductive Health Services: International Human Rights Standards and European Law and Practice*, 19 Eur. J. Health L. 231, 234 (2012).

[6] International Conference on Population and Development *supra*, ¶¶ 7.2, 7.5(a), 7.12, 7.14(c). The ICPD also condemned draconian population policies, including forced sterilization, thereby affirming that coercive laws, policies, and practices that fail to respect individuals' autonomy and decision-making must be eliminated. *Ibid.*

leading voice at the conference[7] and has championed the ICPD framework ever since.[8]

International human rights standards have increasingly articulated protection for reproductive rights, particularly in the area of contraception. For example, the Human Rights Committee, the monitoring body for the International Covenant on Civil and Political Rights (ICCPR), has recognized that a woman's ability to control her reproductive decision-making through the use of contraception is deeply rooted in fundamental rights such as the right to

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[7] *See, e.g.*, Albert Gore, U.S. Vice President, Statement at the International Conference on Population and Development (Sept. 5, 1994) ("[H]ere at Cairo, there is a new and very widely shared consensus * * * . The education and empowerment of women, high levels of literacy, the availability of contraception and quality health care—these factors are all crucial."), *quoted in* International Conference on Population and Development, *supra*, at 176.

[8] Hilary R. Clinton, U.S. Secretary of State, Remarks on the 15th Anniversary of the International Conference on Population and Development (Jan. 8, 2010) ("[W]e are rededicating ourselves to the global efforts to improve reproductive health for women and girls. Under the leadership of this Administration, we are committed to meeting the Cairo goals."), *available at* http://www.state.gov/secretary/20092013clinton/rm/2010/01/135001.htm.

equality and nondiscrimination.[9] The Human Rights Committee has recommended the repeal of laws that ban contraceptive access[10] as well as laws requiring or coercing sterilization.[11] It has also recognized that cost is a key barrier to contraceptive access and has

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[9] Human Rights Committee, *Concluding Observations of the Human Rights Committee: Albania*, ¶ 14, U.N. Doc. CCPR/CO/82/ALB (Dec. 2, 2004); Human Rights Committee, *Concluding Observations: Hungary*, ¶ 11, U.N. Doc. CCPR/CO/74/HUN (Apr. 19, 2002); Human Rights Committee, *Concluding Observations of the Human Rights Committee: Mali*, ¶ 14, U.N. Doc. CCPR/CO/77/ML (Apr. 16, 2003); Human Rights Committee, *Concluding Observations of the Human Rights Committee: Viet Nam*, ¶ 15, U.N. Doc. CCPR/CO/75/VNM (July 26, 2002).

[10] Human Rights Committee, *Concluding Observations on the Fourth Periodic Report of the Philippines*, ¶ 13, U.N. Doc. CCPR/C/PHL/CO/4 (Nov. 13, 2012).

[11] Human Rights Committee, *General Comment No. 28: Article 3 (The Equality of Rights Between Men and Women)*, ¶ 20, U.N. Doc. CCPR/C/21/Rev.1/Add.10 (Mar. 29, 2000); Human Rights Committee, *Concluding Observations by the Human Rights Committee: Peru*, ¶ 21, U.N. Doc. CCPR/CO/70/PER (Nov. 15, 2000); Human Rights Committee, *Concluding Observations on the Fifth Periodic Report of Peru*, ¶ 13, U.N. Doc. CCPR/C/PER/CO/5 (2013); Human Rights Committee, *Concluding Observations: Czech Republic*, ¶ 10, U.N. Doc. CCPR/C/CZE/CO/2 (2007); Human Rights Committee, *Concluding Observations: Slovakia*, ¶ 13, U.N. Doc. CCPR/C/SVK/CO/3 (2011); Human Rights Committee, *Concluding Observations: Slovakia*, ¶ 12, U.N. Doc. CCPR/CO/78/SVK (2003).

urged governments to make contraception widely available and affordable.[12]

As a state party to the ICCPR, the United States has agreed to respect, protect, and fulfill the right of women's equality enshrined in the Covenant. In fulfilling its reporting obligations under the ICCPR, the United States has cited the Affordable Care Act as evidence of our nation's compliance with our treaty obligation to ensure equal access to health care to all

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[12] Human Rights Committee, *Concluding Observations: Republic of Moldova*, ¶ 17, U.N. Doc. CCPR/C/MDA/CO/2 (2009); Human Rights Committee, *Concluding Observations: Poland*, ¶ 9, U.N. Doc. CCPR/CO/82/POL (2004); Human Rights Committee, *Concluding Observations: Argentina*, ¶ 14, U.N. Doc. CCPR/CO/70/ARG (2000); Human Rights Committee, *Concluding Observations: Poland*, ¶ 12, U.N. Doc. CCPR/C/POL/CO/6 (Oct. 27, 2010). Consistent with the ICCPR, the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), which the United States has signed but not ratified, directs States to "eliminate discrimination against women in the field of health care in order to ensure * * * access to health care services, including those related to family planning." CEDAW art. 12(1). Recommendation 24 of CEDAW's interpretive committee has elaborated on the content and meaning of art. 12 by noting that "if health service providers refuse to perform such services based on conscientious objection, measures should be introduced to ensure that women are referred to alternative health providers." *See* Report of the Committee on the Elimination of Discrimination Against Women, 20th & 21st Sess., Jan. 19-Feb. 5, June 7-25, 1999, ch. I, ¶ 11, U.N. Doc. A/54/38/Rev.1 (1999).

segments of society, including women and racial and ethnic minorities.[13]

The United States has also pointed to the Affordable Care Act as evidence of its compliance with other international human-rights commitments. In October 2013, the United States cited the Affordable Care Act in its report to the U.N. Committee on the Elimination of Racial Discrimination, as one way that the country is complying with the Committee's 2008 recommendation that it take steps to "facilitat[e] access to adequate contraceptive and family planning methods"[14] in order to reduce persistent health disparities in women and minorities.[15] Similarly, in the Universal Periodic Review of the United States by the Human Rights Council, the United States cited the Affordable

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[13] Human Rights Committee, *Reports Submitted by States Parties Under Article 40 of the Covenant: Fourth Periodic Report: United States of America*, ¶ 90, U.N. Doc. CCPR/C/USA/4 (May 22, 2012).

[14] Committee on the Elimination of Racial Discrimination, *Concluding Observations of the Committee on the Elimination of Racial Discrimination on the United States of America*, ¶ 33, U.N. Doc. CERD/C/USA/CO/6 (2008).

[15] Committee on the Elimination of Racial Discrimination, *Reports Submitted by States Parties Under Article 9 of the Convention: Seventh to Ninth Periodic Reports of States Parties Due in 2011: United States of America*, ¶ 139, U.N. Doc. CERD/C/USA/7-9 (Oct. 2, 2013); *see also id.* at ¶ 196 ("The United States is also increasing women's access to health care through the ACA which, inter alia, ensures that more women have access to health care services for healthy pregnancies * * * .").

Care Act as evidence of its compliance with international human rights duties to end discrimination against women in health care.[16]

Consistent with these international standards, U.S. foreign policy makes access to family planning a cornerstone of U.S. efforts to promote women's equality around the world. In remarks to the Third International Conference on Family Planning in November 2013, Secretary of State John Kerry reaffirmed the United States' investments in family planning programs as critical to furthering women's equality around the world: "And we'll need to find new ways to remind people that when women and girls are better able to stay healthy and pursue new opportunities, they are also better able to contribute to the success of their families, their communities, their countries and the world. The fact is, when women and girls thrive, so do the people around them."[17]

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[16] Human Rights Council, *Working Group on the Universal Periodic Review: National Report Submitted in Accordance with Paragraph 15(a) of the Annex to Human Rights Council Resolution 5/1*, ¶ 37, U.N. Doc. A/HRC/WG.6/9/USA/1 (Aug. 23, 2010) ("[O]ur recent health care reform bill also lowers costs and offers greater choices for women, and ends insurance company discrimination against them.").

[17] John Kerry, U.S. Secretary of State, Video Remarks on Third International Conference on Family Planning, Washington, D.C. (Nov. 12, 2013), *available at* http://www.state.gov/secretary/remarks/2013/11/217523.htm.

C. The Foreign And International Authorities That Recognize A Limited Right To Conscientious Objection Give Priority To Women's Right To Access Reproductive Health Care

Where a right to conscientious objection has been recognized, foreign and international authorities have required that the exercise of an objection must not interfere with a woman's access to reproductive health services. Consistent with the clear consensus on the importance of birth control to the health of women and families, access to contraception is necessarily included in the health services that are given priority over the objection.

1. Where conscientious objection is recognized, its exercise is regulated to ensure that women can still access reproductive health care

Many nations' health care regimes offer robust protections to individuals for whom directly providing a particular health service would violate a deeply held religious belief. But, in general, systems that extend conscientious-objection protections pair the ability of an individual to invoke the right with a

guarantee that patients may access health care services from a non-objecting party.[18]

Numerous authorities that have recognized conscientious objection in health care have done so in the context of pregnancy-termination services—a factual scenario not before the Court. Amici have identified only one decision addressing conscientious objection to the provision of contraception, and the result was an unequivocal endorsement of women's access to birth control.

In that case, the European Court of Human Rights ruled that pharmacists did not have a right to conscientiously object to providing contraceptive pills to customers with valid prescriptions. *Pichon and Sajous v. France*, App. No. 49853/99 (Eur. Ct. H.R. 2001) (English translation).[19] The pharmacists invoked Article 9 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention"), which provides "the right to freedom of thought, conscience and religion." *See id.* at 3. But the court reasoned that Article 9 "does not always

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[18] The notion of a right of conscientious objection in the context of health care is a relatively new phenomenon. "In contrast to conscientious objection to military service, until quite recently, conscientious objection by health care professionals does not appear to have been a familiar occurrence." Mark R. Wicclair, Conscientious Objection in Health Care: An Ethical Analysis 14 (2011).

[19] *Available at* http://www.strasbourgconsortium.org/document.php?DocumentID=4942.

guarantee the right to behave in public in a manner governed" by one's religious beliefs. *Id.* at 4. The court concluded that conscientious objection by pharmacists could not disrupt the regulated sale of contraceptives under French law. "[A]s long as the sale of contraceptives is legal and occurs on medical prescription nowhere other than in a pharmacy," the pharmacists "cannot give precedence to their religious beliefs and impose them on others as justification for their refusal to sell such products * * * ." *Ibid.*

Decisions addressing conscientious objection in the context of pregnancy-termination services likewise have prioritized women's access to health services. The European Court of Human Rights has held that, if a state permits conscientious objection by health professionals, it has a corresponding obligation to protect the rights of patients:

> For the Court, States are obliged to organise their health services system in such a way as to ensure that an effective exercise of the freedom of conscience of health professionals in the professional context does not prevent patients from obtaining access to services to which they are entitled under the applicable legislation.

R.R. v. Poland, App. No. 27617/04, at 47 (Eur. Ct. H.R. 2011).[20] In that decision, the court ruled a

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[20] *Available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-104911.

woman's right to respect for her private life—which encompasses "the right to personal autonomy and personal development"—was violated because Polish law did not provide an effective mechanism for her to obtain diagnostic tests to determine fetal abnormality following her doctors' refusal to conduct such tests on grounds of conscience. *Id.* at 39-40, 47-48; *see also P. & S. v. Poland*, App. No. 57375/08 (Eur. Ct. H.R. 2012) (reaffirming that states must ensure that conscientious objections do not interfere with patients' rights to obtain services).

Numerous other high-court decisions, many from predominantly Catholic countries, prioritize the protection of women's access to health services. In Colombia, for instance, the Constitutional Court held that "since the conscientious objection is not an absolute right, its exercise is limited by the Constitution itself; that is, it cannot violate the fundamental rights of women." Corte Constitucional [C.C.] [Constitutional Court], noviembre 27, 2009, Sentencia T-209/08, ¶ 4.6 (Colom.). In order to protect women's rights, the court required that "if a doctor alleges a conscientious objection, he must immediately send the woman * * * to another doctor" who can provide the treatment. *Id.* ¶ 4.3; *see id.* Conclusion ¶ 11. And the court reiterated that "although health professionals are entitled to express their conscientious objection, they cannot abuse this right * * * by not immediately

referring the pregnant woman to another physician that is willing to perform the procedure." *Id.* ¶ 5.13.[21]

National bodies that regulate the medical profession impose similar requirements. For example, Portugal's Ministry of Health requires health care institutions to ensure women's access to abortion services where the procedure is otherwise unobtainable because of the conscientious objections of health care professionals. Interrupção Voluntária Da Gravidez/Serviços Obtertricía, Portaria No. 189/98 de 21 março 1998 (Port.). Likewise, the United Kingdom's General Medical Council guidance instructs objecting physicians that they must "[m]ake sure that the patient has enough information to arrange to see another doctor who does not hold the same objection," or if it is not practical for the patient to make arrangements, to "make sure that arrangements are

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[21] Citing the decisions from the European Court of Human Rights and the Colombian Constitutional Court discussed in the text, the Inter-American Commission on Human Rights (IACHR) has addressed conscientious objection in the context of health professionals who object to "family-planning methods, emergency oral contraception," and other reproductive health services. IACHR, Access to Information on Reproductive Health from a Human Rights Perspective ¶¶ 94-95, 99 (2011), *available at* http://www.oas.org/en/iachr/women/docs/pdf/womenaccessinformationreproductivehealth.pdf. The Commission's report recommended that "States must guarantee that women are not prevented from accessing information and reproductive health services, and that in situations involving conscientious objectors in the health arena, the States should establish referral procedures, as well as appropriate sanctions for failure to comply with their obligation." *Id.* ¶ 99.

made—without delay—for another suitably qualified colleague to advise, treat or refer the patient." General Medical Council, Personal Beliefs and Medical Practice ¶¶ 12(c), 13 (Mar. 25, 2013) (U.K.). Similarly, Norway conditions a doctor's "refus[al] to treat a patient" on the patient's "reasonable access to treatment by another doctor." Den Norske Legeforening [Code of Ethics for Doctors], § 6 (Nor.) (translation on file with counsel).

International medical associations impose similar requirements, based on the principle that a doctor's primary duty is to the patient. The World Medical Association (WMA), a global organization representing physician groups from more than 100 countries, including the American Medical Association, British Medical Association, and Canadian Medical Association, mandates that a "physician may not discontinue treatment of a patient * * * without giving the patient reasonable assistance and sufficient opportunity to make alternative arrangements

for care." World Medical Association, Declaration on the Rights of the Patient (1981).[22]

The International Federation of Gynecology and Obstetrics (FIGO), which represents 125 national associations of gynecologists and obstetricians, recognizes that "physicians have an ethical obligation, at all times, to provide benefit and prevent harm for every patient for whom they care." FIGO, Resolution on "Conscientious Objection" (2006). FIGO's "Resolution on 'Conscientious Objection'" requires that objecting physicians refer their patients to another physician who will provide the service. *Ibid.* And when referral is not possible and delay would jeopardize patient health, such as in the case of emergency, the objecting physician must provide the service notwithstanding the objection. *Ibid.*

In the same vein, the World Health Organization has stated that while health care professionals may

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[22] *See also* World Medical Association, About the WMA, http://www.wma.net/en/30publications/10policies/l4/. The WMA's pledge for newly admitted doctors requires doctors to aver that "the health of my patient will be my first consideration," and that "I will not permit considerations of age, disease or disability, creed, ethnic origin, gender, nationality, political affiliation, race, sexual orientation, social standing or *any other factor* to intervene between my duty and my patient." World Medical Association, Declaration of Geneva (adopted 1948, revised 2006) (emphasis added), *available at* http://www.wma.net/en/30publications/10policies/g1/; *see also* WMA Members' List, http://www.wma.net/en/60about/10members/21memberlist/index.html.

interpose a conscientious objection, "that right does not entitle them to impede or deny access to lawful * * * services," and it has emphasized the duty of objecting physicians to refer patients to another provider and provide care in an emergency situation. World Health Organization, Safe Abortion: Technical and Policy Guidance for Health Systems 69 (2012).

Finally, the need to prevent harm to third parties is so strong that many health care regimes require even a conscientious objector to provide services in medical emergencies, when the patient's life or health is at imminent risk. *See, e.g.*, Gazzetta Ufficiale della Repubblica Italiana, Part I, 2 May 1978, No. 140, Art. 9 (It.) ("Conscientious objection may not be invoked by health personnel or allied health personnel if, under the particular circumstances, their personal intervention is essential in order to save the life of a woman in imminent danger.");[23] Abortion Act, 1967, c. 87, § 4.2 (U.K.) (health professionals also not permitted to invoke conscientious objection where providing care "is necessary to save the life or to prevent grave permanent injury to the physical or mental health of a pregnant woman"); Código Deontológico da Ordem dos Medicos, art. 37(3) (Port.) (similar) (translation on file with counsel).[24]

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[23] *Available at* http://www.columbia.edu/itc/history/degrazia/courseworks/legge_194.pdf.

[24] *Available at* https://www.ordemdosmedicos.pt/index.php?lop=conteudo&op=9c838d2e45b2ad1094d42f4ef36764f6&id=84c6494d30851c63a55cdb8cb047fadd.

2. *Foreign and international authorities restrict the right of conscientious objection to individuals directly involved in providing the health care service*

To the extent that other states and international organizations permit a health care provider to interpose an objection, such a right has generally been extended only to medical personnel directly involved in providing the service in question, and not to staff performing peripheral functions. "[O]nly professionals who otherwise would be required to perform services *directly* on patients can invoke grounds of conscience for the purpose of exemption." Rebecca J. Cook & Bernard M. Dickens, World Health Organization, Considerations for Formulating Reproductive Health Laws 33 (2d ed. 2000) (emphasis added). Support staff who are not directly involved in patient care may not interpose an objection. *Ibid.*

As the Constitutional Court of Colombia noted, the right of health care providers to refuse to perform medical services "exclusively applies to direct service providers." Sentencia T-209/08, *supra*, ¶ 4.2. Extending the right to a broader category of individuals would be improper, the court held, because the duties of ancillary personnel "can hardly be found to have a real connection with moral, philosophical, or religious motives" that form a legitimate basis for an objection. Corte Constitucional [C.C.] [Constitutional Court], mayo 28, 2009, Sentencia T-388/09 (Colom.).

In Norway, the conscientious objector provision status "applies only to health personnel who either perform or assist in the operation itself, and not to those who attend to, nurse or treat the woman before and after the operation." The Act dated 13 June, 1975 no. 50 concerning the Termination of Pregnancy, with Amendments in the Act dated 16 June 1978 no. 5, ch. 11, § 20 (Nor.).

Similarly, Spain's conscientious objector provision covers only those health care providers "directly involved" in the medical procedure because such limits are necessary to ensure the highest levels of access and quality of care. Ley Orgánica 2/2010, de 3 de marzo, de Salud Sexual y Reproductiva y de la Interrupción Voluntaria del Embarazo [Law of Sexual and Reproductive Health and Abortion] (2010) (Spain). Spanish courts have interpreted this provision to deny objector status to individuals with peripheral roles. S.T.S., Nov. 27, 2009 (209/08) (Spain). For example, a Spanish administrative court refused to recognize a family doctor as a legitimate objector where he provided information and referrals for abortion but did not perform the procedure himself. Auto del Juzgado Contencioso-Administrativo No. 3 de Málaga, Pieza separada medidas provisionales No. 12.1/2011, Pmto. especial protección derechos fundamentales No. 39/2011, Apr. 5, 2011 (Spain). The court found that the public interest in a health system that provides safe medical procedures takes precedence over a single doctor's objector status. *Ibid.*

A minority of jurisdictions allow a slightly broader category of non-medical personnel to refuse to perform their duties as long as their role is directly related to the procedure in which they would normally participate. For instance, Italian law permits auxiliary or non-medical personnel to conscientiously object to providing services that are specific to, and necessary for, the interruption of pregnancy and not merely incidental to it. Legge 22 maggio 1978, n. 194, art. 9, Gazzeta Ufficiale 22 maggio 1978, n. 140 (Norme per la Tutela Sociale della Maternità e sull'Interruzione Volontaria della Gravidanza) [Italian Rules for the Interruption of Pregnancy] (It.). Persons providing medical assistance before and after the procedure are considered too attenuated to invoke conscientious objector status under the provision. *Ibid.*

The United Kingdom's conscientious objection provision does not distinguish between medical and non-medical personnel for purposes of claiming the right, but rather affords the right to anyone with duties requiring him or her to "participate in any treatment" under the Act. Abortion Act, 1967, c. 87, § 4 (U.K.). U.K. courts have interpreted this clause to require the objector to have a role in the medical procedure itself. In 1988, the U.K. House of Lords upheld the Court of Appeals and lower court decisions to refuse to extend conscientious objector status to a doctor's secretary who was terminated for refusing to type a referral letter because her actions were too remote from participation in the procedure. *Janaway*

v. Salford, HA [1988] 3 All ER 1079 (Eng.); *see also Doogan & Wood v. NHS Greater Glasgow & Clyde Health Board*, [2013] CSIH 36 (Scot.) (conscientious objection may only be claimed by those "'actually taking part in treatment administered in hospital or other approved place'" (quoting Lord Keith in *Janaway*, HA [1988] 3 All ER 1079), *appeal pending*.

The right being asserted by the employers in these cases runs contrary to the view that only parties directly involved in providing a medical service are entitled to conscientious objector status. The direct providers here are the physicians who counsel their patients and prescribe contraception methods; there is simply no legal precedent for objections from anyone else. A private corporation that does not provide contraceptives but instead must sponsor an employee

health plan that covers contraception is far too attenuated to justify a claim of conscientious objection.[25]

3. These limitations on conscientious objection comport with this Court's religious freedom jurisprudence

These limits imposed by foreign and international law on conscientious objection in health care are consistent with how this Court has balanced the interests at stake in evaluating free exercise claims. As the Court has stressed, "[o]ur cases do not at their

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[25] Indeed, the employer is many steps removed from the services objected to here. Premium dollars—both the employer's and the employee's—are aggregated into a large pool, from which the health plan administrator pays claims to reimburse employees or health care providers for covered services. A woman seeking contraception will typically visit a health care provider and receive a prescription, and then must fill that prescription and decide to use the contraception. There are thus numerous intervening decisions between the employer's sponsorship of the health plan and an individual employee's use of contraception.

Moreover, health care benefits are appropriately viewed as a form of employee compensation—like wages but in a different form. Justin Falk, Congressional Budget Office, Comparing Benefits and Total Compensation in the Federal Government and the Private Sector 2, 4 (2012), *available at* http://www.cbo.gov/sites/default/files/cbofiles/attachments/2012-04FedBenefitsWP_0.pdf; *see also* Buck Consultants, Total Remuneration, https://www.buckconsultants.com/Services/Compensation/Totalremuneration.aspx (last visited Jan. 24, 2014). It makes no more sense to allow an employer to selectively deny coverage for basic health care services based on a religious objection than it would to allow that employer to forbid an employee from using her wages to purchase contraception.

farthest reach support the proposition that a stance of conscientious opposition relieves an objector from any colliding duty fixed by a democratic government." *Gillette v. United States*, 401 U.S. 437, 461 (1971). Rather, "[t]o maintain an organized society that guarantees religious freedom to a great variety of faiths requires that some religious practices yield to the common good." *United States v. Lee*, 455 U.S. 252, 259 (1982). Were it otherwise, "the professed doctrines of religious belief [would become] superior to the law of the land, and in effect [ ] permit every citizen to become a law unto himself." *Reynolds v. United States*, 98 U.S. 145, 166-167 (1978).

Thus, in evaluating a claim to a religious-based exemption to a general law, this Court has repeatedly considered whether the claimed exemption would burden others. *See Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 18 n.8 (1989) (plurality opinion). When the Court has upheld an exemption, it has usually done so after noting that the religious freedom asserted by plaintiffs did "not bring them into collision with rights asserted by any other individual." *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 630, 633 (1943); *see also Braunfeld v. Brown*, 366 U.S. 599, 604 (1961) (rejecting Free Exercise challenge to state Sunday closing law); *Sherbert v. Verner*, 374 U.S. 398, 403 (1963) (distinguishing petitioner's claims for unemployment benefits after being fired for refusing to work on her Sabbath day from cases rejecting free exercise challenges to government

regulation of conduct that "posed some substantial threat to public safety, peace or order").

When such a collision of interests exists, the Court has generally refused to grant an exemption to the law. For instance, in *Lee*, the Court explained that "[w]hen followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity." 455 U.S. at 261. The Court rejected the challenge to social security taxes in *Lee*, observing that "[g]ranting an exemption from social security taxes to an employer *operates to impose the employer's religious faith on the employees.*" *Ibid.* (emphasis added); *cf. Prince v. Massachusetts*, 321 U.S. 158, 177 (1944) (Jackson, J., concurring in the judgment) ("My own view may be shortly put: I think the limits [on religious freedom] begin to operate whenever activities begin to affect or collide with liberties of others or of the public.").

D. Foreign And International Authorities Have Thus Far Recognized Conscientious Objector Rights Only For Individuals, Not For-Profit Corporations

Although the question of whether a for-profit corporation can assert conscientious objection is relatively new, to the extent such an assertion has been addressed by foreign and international tribunals, it has been rejected. Conscientious objection in the health care context has only been recognized as

extending to individuals. Foreign courts and tribunals have ruled that permitting institutions to conscientiously object to the provision of legal reproductive health services could interfere with the exercise of other fundamental rights, including the right to freedom of conscience of the employees working within such institutions and the right of women to access legal reproductive health services.

For example, the Colombia Constitutional Court has explicitly rejected an institutional right to conscientious objection. Colombian Constitutional Court cases: Corte Constitucional [C.C.] [Constitutional Court], mayo 10, 2006, Sentencia C-355/06 (Colom.); Sentencia T-209/08, *supra*; Sentencia T-388/09, *supra*; Corte Constitucional [C.C.] [Constitutional Court], agosto 10, 2012, Sentencia T-627/12 (Colom.). In a 2006 decision, the court ruled that the right to conscientious objection does not extend to institutions such as clinics, hospitals, and health centers; it is only applicable to natural persons. *See* Sentencia C-355/06, *supra*. The court found that institutional objection is not necessary because individuals who belong to or are employed by institutions can still exercise their right to freedom of conscience individually. *Ibid.* Additionally, in a 2009 decision, the Court reiterated that conscientious objection is an "individual decision and not institutional or collective [decision]." Sentencia T-209/08, *supra*.

Likewise, the French Constitutional Council has recognized that freedom of conscience extends to individuals and not to institutions. The decision upheld the repeal of provisions of the Code of Public

Health that permitted "heads of departments in public health establishments to refuse to allow terminations of pregnancy to be practised in their department." Conseil constitutionnel [C.C.] [Constitutional Court] decision No. 2001-446DC, June 27, 2001, Rec. 74, ¶ 11 (Fr.).[26] Because the head of the department "retains the right under the relevant provisions [of] the Code of Public Health to refrain from terminating [pregnancies] himself; this safeguards his freedom of personal conscience, which cannot be exerted at the expense of that of other doctors and medical staff working in his service." *Id.* ¶ 15. Moreover, permitting the conscientious objection of the department head to extend throughout the department would undermine the freedom of conscience of the other health care providers working within the institution. *Ibid.*

Laws in many other countries expressly limit conscientious objection rights to individuals and, by extension, refuse to extend the claimed right of conscientious objection to institutions. For example, the laws of Denmark provide that "doctors, nurses, midwifes and social and health assistants, or students in these professions, for whom it is contrary to

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[26] *Available at* http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank_mm/anglais/a2001446dc.pdf. The French Constitutional Council is an interpretive body whose decisions are binding on all public and administrative agencies. *See* Conseil Constitutionnel, General Presentation, http://www.conseil-constitutionnel.fr/conseil-constitutionnel/english/presentation/presentation.25739.html (last visited Jan. 24, 2014).

their ethic or religious beliefs to perform or assist in induced abortion, can apply for and be granted exemption." Sundhedsloven, LBK nr. 913 [Health Act, Law Notification no. 913], at Chapter 28, Section 102, Copenhagen, Civilstyrelsen [Civil Affairs Agency] (Den.).[27] Similarly, New Zealand's conscientious objector provision extends protections only to a "medical practitioner, nurse, or other person." Contraception, Sterilisation, and Abortion Act 1977 § 46 (2013) (N.Z.).[28]

That conscientious objection rights adhere only to individuals is consistent with our nation's heritage. This Court has repeatedly upheld general laws governing commercial or public activity against

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[27] *Available at* https://www.retsinformation.dk/forms/r0710.aspx?id=130455&exp=1.

[28] *Available at* http://www.legislation.govt.nz/act/public/1977/0112/latest/DLM17680.html. Amici are aware of only one country—Argentina—that offers a right of conscientious objection to an institution, and that right is limited. There, federal law allows denominational institutions that provide health services to conscientiously object to the provision of reversible contraception. Decreto No. 1282/2003, May 23, 2003, art. 10 (Arg.). However, only individual medical providers can conscientiously object to abortion services and surgical contraception. Ministerios de Salud [Health Ministry], Guía Técnica para la Atención Integral de los Abortos No Punibles, June 2010, § 6.3.3 (Arg.); Ley No. 26.130, Aug. 9, 2006, art. 1 (Arg.). In the Australian state of Western Australia, the provisions in the health act that relate to the performance of abortions indicate that "[n]o * * * hospital, health institution, other institution or service is under a duty, whether by contract or by statutory or other legal requirement, to participate in the performance of any abortion." *Health Act 1911* (WA) § 334(2) (Austl.).

free-exercise challenges by institutions involved in those activities. For example, the Court held that the Free Exercise Clause did not require an exception to an IRS policy that tax-exempt status is available only to educational institutions that do not discriminate on the basis of race. *See Bob Jones University v. United States*, 461 U.S. 574, 604 (1983).

CONCLUSION

For the foregoing reasons, the judgment of the Tenth Circuit in No. 13-354 should be reversed, and the judgment of the Third Circuit in No. 13-356 should be affirmed.

Respectfully submitted,

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